No. 10063

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ALBERT G. STANGER AND PHYLLIS STANGER,
Appellees.

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the United States for the District of Idaho, Eastern Division..

GEORGE H. SMITH
Salt Lake City, Utah
H. B. THOMPSON
L. H. ANDERSON
Pocatello, Idaho
Attorneys for Appellant

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INDEX

CITATIONS

CITATIONS (Continued)

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In the appellees' brief some material facts appear to have been overlooked, first, in the statement of facts, and secondly, in the argument predicated upon the assumed facts, and some propositions of law have been advanced to which we believe a response helpful to this court can be made without too exhaustive a discussion; consequently we are filing this brief in reply.

What purports to be a complete summary of appellant's testimony appears at pages 16 to 22 inclusive of the appellees' brief. There is omitted from this statement however any reference to the testimony of L. R. Nichols, a mechanical foreman of thirty-three years experience employed by the defendant Railroad Company at LaSalle, Colorado (R.260), who

arrived at the scene of the accident within 15 or 20 minutes after its occurrence and located all of the parts of the broken wheel, which consisted of five pieces, which he collected up and packed and shipped to the Engineer of Tests of the Railroad Company at Omaha, and when asked to state whether or not the breaks on these parts were new or old breaks his answer was that they were all new breaks (R. 263-264). Upon cross-examination he stated that they constituted the complete rim of the wheel and that the plate and hub were on the axle, that the wheel was all there and the parts fit together (R.264). This witness had no interest in the matter and was not impeached in the slightest degree. His testimony did not assume to be expert, did not consist of conclusions but consisted of plain statements of fact by an experienced mechanical foreman. His testimony links with that of Mr. Pflasterer, which was not merely the hypothetical testimony of an expert but which embraced reliable and undisputed testimony of the physical facts which he observed upon making a laboratory examination of the wheel, to the effect that the breaks were bright and shiny and all new breaks (R.289); the rupture or break was "from the inside face, the flange side, outward. The edge at the outside is serrated irregular. It is no trick to trace it," and there was no way to find the breaks without cutting the wheel up (R.288). Plaintiffs' counsel objected to the question upon the ground that it called for a pure conclusion of the witness to which the court responded: "He expressed his opinion from his personal knowledge. Overruled." (R.288). The witness' testimony therefore was offered and received by the court as testimony of facts. It is true that he testified also as an expert, but that he testified as to pertinent

facts, which stand undisputed and unimpeached, and that this is corroborated by and coincides with pertinent facts testified to by Mr. Nichols appears to have been overlooked by the appellees in the discussion of the defendant's testimony and the citation of authorities dealing with the question of res ipsa loquitur and the meeting of the prima facie case.

We will respond to the argument in the order of its presentation in the brief.

I.

Under this point at pages 23 and 24 of the appellees brief some authorities are cited on the rules of review of findings and conclusions of the lower court. Since this court is continuously so conversant with anything that may be cited on this point we are content to say that we accept the appellees postulate that "Findings will not be disturbed on appeal if they are supported by sufficient evidence." Conversely it is equally true that unless the findings of fact are supported by the evidence and the conclusions are warranted from the findings that can properly be made the judgment will be reversed. This court has said it is in as good a position as the trial court was to appraise the evidence and that it has the burden of doing that. Our contention is that the evidence was undisputed (1) with reference to the cause of the derailment, which was a fresh break of a wheel, which break could not have previously been discovered except by cutting the metal, and (2) that upon the undisputed record Mrs. Stanger was afflicted with a well established chronic ailment for the cure of which the operation was performed and that d a m a g e s have been erroneously assessed therefor against the Railroad Company.

II.

Res Ipsa Loquitur

This subject is discussed at pages 25 to 32, inclusive, of the appellees brief.

When the language of these decisions, which consist chiefly of California decisions and citations from California Jurisprudence, is analyzed there does not appear to be much upon which to further take issue. They appear to proceed upon the assumption, implied if not expressed, that where the derailment of a passenger train has been shown to have resulted from a mechanical failure which suddenly occured and which could not have been discovered by prior inspection the presumption may be weighed in the scales of evidence as against the defendant's evidence. The California rule at once becomes irrelevant because the California decisions g i v i n g presumptions the weight of evidence opposed to other evidence are based upon Sections 1957 and 1963 California Code of Civil Procedure as interpreted by the California Supreme Court.

Monterey County vs. Donnolly, 83 Cal. 507, 510;

People vs. Milner, 122 Cal. 197;

Ariasi vs. Orient Insurance Co., 50 Fed. (2d) 548, 552.

The oversight of this distinction is carried into the appellees brief at page 27, where the text of a California decision is italicised for emphasis, by applying the test of "whether or not the explanation was sufficient to balance or overcome the inference raised under the doctrine of res ipsa loquitur." The

word inference as above used is synomymous with the word presumption. Preceding in the text it is stated that under the doctrine of res ipsa loquitur the defendant must explain "in some degree." Accepting that as the true expression of the rule and rejecting the further test in that opinion based upon a statute permitting the presumption claimed by the rule to weigh in the scale of evidence the decision will be in harmony with the decisions at large (Wigmore Evidence, 2d Ed. Sec. 2491; 95 A. L. R. 880).

Also at page 27 of the brief an Arizona decision is quoted from, but it will be observed that that decision deals with "facts proven" to be weighed against the evidence of the carrier. The force of that decision, if indeed it has any force opposed to the contention of the appellant, is fully overcome and so admirably stated in a recent decision of the Arizona Supreme Court, Seiler vs. Whiting, 84 Pac. (2d) 452, 454-455, that we quote from it as follows:

> "We consider next the question of presumptions. There has been much erroneous thinking and more loose language in regard to presumptions. We read of presumptions of law and presumptions of fact, of conclusive presumptions and disputable presumptions. In truth there is but one type of presumption in the strict legal meaning of the word, and that is merely a general rule of law that under some circumstances, *in the absence of any evidence to the contrary,* a jury is compelled to reach a certain conclusion of fact. But a presumption so declared by the law is only raised by the absence of any real evidence as to the existence of the ultimate fact in question. It is not in and of itself evidence, but merely an arbitrary rule imposed by the law, to be applied in the absence of evidence, and whenever evidence contradicting the presumption is

> offered the latter disappears entirely, and the triers of fact are bound to follow the usual rules of evidence in reaching their ultimate conclusion of fact. As was once said, 'Presumptions may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts.' Mockowik vs. Kansas City, etc. R. Co., 196 Mo. 550, 94 S. W. 256, 262. The Supreme Court of South Dakota, in Peters vs. Lohr, 24 S. D. 605, 124 N. W. 853, in discussing the question, used the following language (page 855): '* * * A presumption is not evidence of anything, and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue. A presumption will serve as and in the place of evidence in favor of one party or the other until prima facie evidence has been adduced by the opposite party; but the presumption should never be placed in the scale to be weighed as evidence. The presumption, when the opposite party has produced prima facie evidence, has spent its force and served its purpose, and the party then, in whose favor the presumption operated, must meet his opponents prima facie evidence with evidence, and not presumptions. A presumption is not evidence of a fact, but purely a conclusion. Elliott Ev. Secs. 91, 92, 93; Wigmore, Ev. Secs. 2490, 2491.* * *''

Before concluding our discussion of this subject by a citation of the authorities binding upon this court we will make brief reference to other authorities cited by the appellees in the discussion of this point.

At page 29 of the brief appellees cite T. & P. R. Co., vs. Carlin, 189 U. S. 354 as authority for the proposition that a jury is not bound to believe an explanation. The briefest examination of that decision will disclose to an informed mind that it has no relevancy or weight in the present discussion.

That decision related to a negligence action decided on disputed testimony and not to a case where an unsupported presumption was pitted against undisputed evidence.

> "Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear presumptions disappear."
>
> Lincoln vs. French, 105 U. S. 614.

The annotation to 95 A. L. R. 869, beginning at 878, and particularly at page 880, cites the decisions of the federal courts and of most state courts as supporting this statement of the law. The same result was arrived at by this court with the copious citation of authorities in Ariasi vs. Orient Insurance Company, 50 Fed. (2d) 548, particularly discussed at pages 552 and 553.

This court is equally familiar with the decision of the United States Supreme Court in New York Life Insurance Company vs. Gamer, 303 U. S. 161, 114 A. L. R. 1218, decided on appeal (certiorari) from this court, in which the United States Supreme Court held:

> "The presumption that a violent death was accidental rather than suicidal is not evidence and may not be given weight as evidence."

At page 171 of 303 U. S. the court said:

> "The evidence being sufficient to sustain a finding that the death was not due to accident there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of

> violent death, there being nothing to show the contrary, accidental death will be presumed. The presumption is not evidence and may not be given weight as evidence," (citing authorities).

The reported case discloses that in the Gamer case, before the Supreme Court, the defendant in certiorari cited numerous California decisions, which were not accepted in arriving at the decision.

To rest a judgment, or affirmance, herein on the balancing of the presumption against the facts proven in the record would be to deny to the defendant due process of law.

> Western & Atl. R. Co., vs. Henderson, 279 U. S. 639.

III.

The appellees' argument on this point is distinguishable at the outset because it proceeds upon the erroneous assumption that the plaintiffs' case was opposed only by the opinion of an expert, and ignores the undisputed *facts* testified to by such expert, and undisputed *facts* testified to by the witnesses Nichols and Schroeder.

The decision in Erie Railroad Company vs. Tompkins, and the two Idaho cases cited at page 32 of the appellees brief do not affect the question.

Erie Railroad Company vs. Tompkins merely held that the federal courts are bound to follow the decisions of the state courts on matters of substantive law, it did not deal either with the admissibility of evidence or the weight to be given to evidence which had been admitted.

Extended discussion or analysis of the two Idaho cases cited at page 32 of appellees' brief is unnecessary because if they possessed any controlling force either under rules of law applicable to this case or otherwise they must yield to the more recent decision of the Idaho Supreme Court in Stroscheim vs. Shay, et al., 120 Pac. (2d) 267, where at pages 271-272 the court said:

> "Appellant contends that the testimony of Dr. Peacock that appellant was able to return to his normal work on or before May 20, 1941, and that he had no permanent disability, being the testimony of an expert medical witness, is purely advisory, therefore not sufficient to support the Board's finding No. 6. In support of such contention, appellant cites and relies upon Nistad vs. Winton Lbr. Co., 61 Idaho 1, 99 P. 2d 52, reported in 59 Idaho 533, 85 P. 2d 236; also he cites Evans vs. Cavanagh, 58 Idaho 324, 73 P. 2d 83; Suren vs. Sunshine Min. Co., 58 Idaho 101, 108, 70 P. 2d 399, 403. * * *
>
> "There is no distinction between expert testimony and evidence of other character as regards the weight to be given it in a particular case. Treadwell vs. Nickel, 194 Cal. 243, 228 P. 25; Rolland vs. Porterfield, 183 Cal. 466, 191 P. 913. In Langford vs. Jones, 18 Or. 307, 22 P. 1064, it was held that opinions of experts on questions of medical science, though based upon hypothetical statements, are entitled to the same consideration as other direct oral testimony, when such statements are found to be real."

Appellant's evidence is conclusive, creditable, and was binding upon the trial court.

Appellees in their brief take no exceptions to the cases cited by the appellant and, of course, could not refute the

uncontradicted testimony of appellant's witnesses in rebutting the allegations of negligence charged in their complaint, which alleged that the appellant was guilty of negligence by reason of defective equipment, roadbed and tracks (R.3). Full explanation was made by appellant's witnesses with respect to each of the various alleged grounds of negligence; and there was no occasion to make any other explanations.

The appellees, while not disputing defendant's uncontradicted evidence or the effect of it, merely suggest that the witness Claude R. Pflasterer was an expert and interested witness and for that reason his testimony under the law be disregarded by the trial court.

Pflasterer's testimony, as we have heretofore shown, was primarily strictly factual, and corroborated by the factual testimony of an experienced mechanical foreman, and his final testimony on the point was not based upon any supposition or hypothesis but upon a definite and careful examination and test of the wheel which demonstrated the actual cause of the break, and neither the physical facts nor the scientific opinion are disputed. The testimony shows by the evidence of the witnesss Schroeder, Nichols and Pflasterer that all of the broken parts of the wheel were new, fresh and clean breaks (R. 263, 267, 289). All parts of the broken wheel were located, picked up, packed and shipped to Dr. Barr at Omaha (R.263-264), and all of the broken parts fit the part of the plate left on the axle (R.264). These parts when received by Dr. Barr at Omaha were subjected to a mettallurgical test by the witness Pflasterer to determine what caused it to break (R.277), who

found, not by any guess or speculation, that the wheel broke due to internal stresses (R.286), and that these stresses which caused the wheel to break could not be discovered by any kind of inspection and could not be found "without cutting the wheel up" (R.288). Thousands of wheels of this same type are used by railroads all over the country, made by the same mill and the same specification (R.289-290). All railroads purchase wheels under the A. R. A. (American Railway Association) specifications (R.286-287), and this wheel met the specifications (R.294-296). Since 1912 there have been but two wheels break from such causes (R. 289-290).

This analysis will demonstrate that Pflasterer's testimony was based upon an actual observation of the broken parts, supported by the testimony of Schroeder and Nichols, and the actual test of the metal which he made, which, as described by him, definitely shows that when he sawed through the wheel it bound the tool and it was necessary to put in a wedge and continue through the wheel (R.286) definitely establishing the stress in the wheel and that there is no other way "to find them without cutting the wheel up" (R.288). There is therefore very little opinion, if any, expressed in his testimony, but if there be any it is blended into actual facts.

What caused this wheel to break was also a subject of expert testimony,

20 Am. Juris. 682,

and we think that without defendant's testimony, and that of Pflasterer, the court could not say from common knowledge or otherwise what caused the wheel to break. He was a skilled

witness in the line of work that he was doing and in the test that he made of the wheel and had the right to express an opinion, which when done was binding upon the court.

20 Am. Juris. 1061.

Counsel at page 34 of their brief cite the case of Brandes vs. Rucker-Fuller Desk Co., 282 Pac. 1009, in support of the theory that the court was not bound to accept Pflasterer's testimony. Appellees indicate that this is a Colorado case, however that is not correct, it is a California case, and is readily distinguishable because the testimony there showed that after the steering shaft broke the driver was guilty of negligence in not bringing the vehicle under control, and a reading of the decision shows that the question of expert testimony was probably merely incidentally mentioned by the court and the judgment was reaffirmed upon the negligence of operating the vehicle. However, notwithstanding the statement of the court in that case the California court in other decisions has since distinguished that rule by one which says:

> "* * * when the matter in issue is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive."

Nichols vs. Jacobson (Cal.) 298 Pac. 505.

This was a case in which the doctrine of res ipsa loquitur applied and defendant's motion for nonsuit which was granted by the trial court was sustained.

In William Simpson Construction Co. vs. Industrial Acci-

dent Commission (Cal.) 240 Pac. 58, the court annulled an award of the Industrial Accident Board because the expert witness who testified were not disputed and the matter was a subject of skilled or expert testimony. The court laid down the rule that the question being one for experts it could only be established by such testimony and, after citing cases, the court said:

> "The rule to be drawn from these decisions, as we understand them, appears to be that whenever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. If follows that in such cases neither the court nor the jury can disregard such evidence of experts, but, on the other hand, they are bound by such evidence, even if it is contradicted by nonexpert witnesses. The same rule would, of course, apply to a proceeding before the Industrial Accident Commission. Under this rule, the Commission, in the present proceeding, could not reject the evidence of the medical experts when testifying upon any subject peculiarly within their own knowledge. The same rule would apply as to opinions of the medical experts upon a subject solely within their professional knowledge, and not within the knowledge of the ordinary individual."

To the same effect see Pearson vs. Crabtree, (Cal.) 232 Pac. 715, where the court held that an instruction which was refused by the court correctly stated the law and another instruction which the court gave did not correctly state the law consituted prejudicial error. The prejudicial instruction was one which told the jury that they might disregard the opinions of experts. This testimony related to x-ray pictures, which the court held to be knowledge not possessed by the ordinary

layman and that the jury was bound to accept such testimony.

In Hutchinson vs. Miller and Lux, (Cal.) 212 Pac. 394, the court held that the jury could not disregard the expert opinion evidence of the only witness who testified concerning the speed of the driver's motorcar or the power and adjustment of his lights.

> See also Hines vs. Industrial Accident Commission, by the Supreme Court of California, 8 Pac. (2d) 1021.

Another state case directly in point is that of Harris vs. Nashville C. & St. L. Ry. (Ala.) 44 So. 962, 14 L. R. A. N. S. 261. In this case it is interesting to note the statement of the annotator at the bottom of page 262 of 14 L.R.A.N.S., where he says that it was a common belief that the act of reversing an engine is more effective in causing it to stop than to apply the air brakes, which he concluded was an erroneous belief and says:

> "One entertaining such convictions is likely to agree with the majority of the court in the Harris Case where it suggests that the testimony of the engineer may be considered as the statement of a positive fact based on tests and experience, rather than as an opinion. Certainly he would not deny that the question is one of scientific, rather than of common, knowledge."

Such we think is a correct statement of the effect of the witness Pflasterer's testimony in the case at bar; and in the Harris case the court said:

> "If the engineer did all things known to skillful engineers to stop the train, the defendant was not

> guilty of negligence in this respect; and, in the absence of any evidence to the contrary, the affirmative charge should have been given for the defendant. If it is not true that what he did was the quickest way to stop the train, the plaintiff should be able to get some evidence to the contrary, and not have to rely upon the common knowledge of courts to establish an inference contrary to the unanimous verdict of men skilled in the science of operating trains. If such evidence is not obtainable, that fact alone would confirm the expert testimony heretofore given on this subject. In the absence of some proof to the contrary, the expert evidence should not be questioned by the common knowledge of courts and juries."

Appellees also cite as authority the case of Dayton Power & Light Co., vs. Public Utilities Commission, 292 U. S. 290, 54 S. Ct., 647, 78 L. Ed. 1267, but that case is definitely distinguishable because the expert testimony had to yield to the value of the leases dependent upon the capacity of the lands to yield productive wells and that any statement concerning that could not be changed until tested by experience.

However, the United States Supreme Court has recognized the same rule as the California and Alabama courts referred to above in the case of International Shoe Co., vs. Federal Trade Commission, 280 U. S. 291, 74 L. Ed. 431, where on page 299 of 280 U. S. the court said:

> "the existence of competition is a fact disclosed by observation rather than by the processes of logic; and when these officers, skilled in the business which they have carried on, assert that there was no real competition in respect of the particular product, their testimony is to be weighed like that in respect of other matters of fact. *And since there is no testimony to the*

> *contrary and no reason appears for doubting the accuracy of observation or credibility of the witnesses, their statements should be accepted.*" (Italics ours)

In McCardle vs. Indianapolis Water Co., 272 U. S. 400, 71 L. Ed. 316, the court said:

> "The testimony of a competent valuation engineer who examined the property and made estimates in respect to its condition is to be preferred to mere calculations based on averages and assumed probabilities.
>
> See also Bene vs. Jeantet, 129 U. S. 683, 32 L. Ed. 803.

In Watjen vs. Louisville Tobacco Warehouse Company, (6th Cir.) 29 Fed. (2d) 801, the court reversed a judgment for the plaintiffs because of the uncontradicted testimony of three experienced tobacco men who testified for the defendant concerning values, "neither their competency nor integrity was attacked," and there was no independent countervailing testimony and the decision of the court is reflected in the syllabus, which is as fallows:

> "In buyer's action for seller's breach by delivering inferior tobacco, where experienced tobacco men testified to the difference in value after careful comparison of samples, and there was no independent countervailing testimony, and samples of all the tobacco were not exhibited to the jury, the court should have charged that the damages were beyond dispute in event of recovery, instead of leaving the damages to the jury's discretion."

In Elkins vs. Commissioner of Internal Revenue, (3rd Cir.) 91 Fed. (2d) 534, the court said:

> "Petitioner introduced an expert witness familiar with the income tax law of the United Kingdom, who testified that under British law the shareholder is regarded as a taxpayer in respect to the amounts deducted from the dividends for income taxes 'appropriate' thereto. This proof was not contradicted, and, like the proof of any other question of fact, should not be arbitrarily disregarded."

In Diamond Alkali Co., vs. Heiner, 60 Fed. (2d) 505, the judgment of the trial court was modified and in discussing the position taken by the trial judge concerning expert testimony the court said:

> "It is apparent that he ignored the testimony of skilled and experienced witnesses, *based upon actual facts,* and reached a conclusion contrary to their testimony, without any substantial evidence to sustain his conclusion." (Italics ours).

Before a trial court can ignore the expert testimony in a case, particularly of the nature of the testimony in the case at bar, there must be some other evidence in the record on which to base such a departure from the testimony, and in the absence of such testimony there is nothing which can be said to dispute such expert evidence.

> The B. F. Guinan, 40 Fed. (2d) 277.
>
> To the same effect see: Ewing vs. Goode, (6th Cir.) 78 Fed. 442, 444.
>
> "There is no room for the exercise of common knowledge as against the uncontradicted testimony of an expert. Similarly, the view is stated that the testimony of experts becomes more than mere opinion

where it consists of facts revealed by the use of technical instruments and where it is scientifically established to the degree of actual demonstration."

20 Am. Juris. 1061, Sec. 1208.

See also: J. T. Morgan Lumber Co., vs. Williams, (Ky.) 136 S. W. 131;

Jensen vs. Wisc. Cent. RR Co., (Wisc.) 128 N.W. 982;

Kerwin vs. Friedman (Mo.) 105 S. W. 1102.

Finally we think the correct rule of law is announced by the United States Supreme Court in the case of Kansas City S. R. Co., vs. C. H. Albers Commission Co., 223 U. S. 573, 56 L. Ed. 566, 567, where the court said:

> "The uncontradicted testimony of witnesses likely to be informed on the subject disclosed the existence of an applicable lawful rate on the northern line from Omaha to Kansas City. True, this testimony was not the best evidence, but, being offered and admitted without objection, it was evidence which could not be disregarded."

Accordingly the authorities cited by the appellant in its original brief at pages 21 to 39, inclusive, are conclusive of the matter.

IV.

Under this heading it is asserted by appellees that the law undoubtedly is that whoever manufactures the equipment of a common carrier of passengers is regarded as the agent of the

common carrier and the fact that it was manufactured in an independent establishment makes no difference and the negligence of such manufacturer is chargeable to the common carrier, or differently stated, the purchase of defective machinery from another is no defense. This seems to us a rather brash statement in view of the readily determinable condition of the law and the further fact that the appellees have cited cases from but three American jurisdictions to support the assertion, to-wit: from California, New York and Kentucky.

The case of Morgan vs. Chesapeake & Ohio Ry. Co., cited at page 42 of appellees' brief is, as the citation shows, reported in 15 L.R.A.N.S. 790. There is quite an extensive footnote to this case and the first paragraph of that footnote states that the rule asserted by appellees at page 35 of their brief has never been recognized as the true doctrine outside of New York, except in California and Kentucky. The first paragraph of the footnote to this case is as follows:

> "The court, in Morgan vs. Ches. & O. R. Co., bases its position that the carrier is chargeable with the failure of the manufacturer to exercise the utmost human skill and foresight, upon the case of Hegeman vs. Western R. Corp., 13 NY 9, 64 Am. Dec. 517, which however, has never been recognized as the true doctrine outside of New York, except in California; the recognized rule of liability of a carrier of passengers for injuries sustained in consequence of latent defect in its cars being that there is no liability if such defect could not have been discovered by the exercise of that high degree of care incumbent upon the carrier itself and by the application of the well recognized and usual test for defects."

Since the appellees have cited cases from those courts only

we assume that the foregoing statement of the annotator will not be challenged. These decisions being against the considered weight of authority and the principle announced by the appellees disproved as a general proposition of law we assume that further discussion of this point will not be necessary.

It might be said, however, that the New York case of Hegeman vs. Western R. Co., 616 Barb 353, cited at page 41 of appellees' brief qualified its ruling merely to a holding that the carrier might be held liable if the defect could be ascertained by a known test. The same exprssion will be found in the Kentucky case of Morgan vs. C. & O. Ry Co., 105 S. W. 961.

We think the record on this point supports no other conclusion than that the only known test which would have revealed the condition from which the failure of the wheel proceeded was to saw it, as testified by Mr. Pflasterer (R.288-289), but be this as it may for the purpose of this point, the courts at large throughout the United States have uniformly refused to commit themselves to the principle of law for which the appellees contend, for the virtual effect of it would be to make the carrier an insurer.

V.

The Fibrosis Uterus and the Operation

Under this subject, discussed at pages 42 to 46 inclusive of the appellees brief, it is first suggested that because Mrs. Stanger testified that she "was in substantially perfect health and had been for several months prior to the accident * * *, and was in better condition than she had been for a long time, and had been in perfectly normal health" (quoting from the

brief), this testimony should be accepted in face of her medical history, the undisputed testimony of the physicians and the pathologist. Also the statement in the brief above quoted constitutes an exceedingly free translation of such testimony as she did give. What she actually stated was that her physical condition for three months previously had been perfect, that for about three months before she had been to a doctor and that he checked her up and she had been in perfectly normal health. Obviously she could not be the judge of whether she was in perfect normal health so far as concerns the question of her having a fibrosis uterus, the result of childbirth infection and consisting of an ailment which develops over a considerable period of time and which under the facts in this case must have been developing for close to a year. Her statement that she had been to a doctor for about three months before and he checked her up and she had been in perfect normal health for three months, in view of Dr. Woolley's undisputed testimony that she had gone to him November 10, 1939 (R.216), two months previous to the accident, who treated her for an ailment which under the medical testimony could have proceeded only from the fibrosis uterus, her last visit to Dr. Woolley being December 14, 1939 (R.220), approximately one month prior to the time of the derailment, certainly can not serve as a basis of assumption in determining the question before the court. Furthermore, where is there evidence in the record that will support a finding that Phyllis Stanger will continue to suffer nervously and/or physically in consequence of the derailment so long as she may live? (Error V.)

At page 46 of the brief the appellees quote an instruction embraced in a decision of the Idaho Supreme Court, Jones vs.

Caldwell, 116 Pac. 110, cited by this court in Union Oil Company vs. Hunt, 111 Fed. (2d) 269, at page 270. It is clear upon reading the rule announced in the Hunt case at page 277 that the Jones case was cited on another point, viz., that where the evidence establishes that the plaintiff was suffering from a chronic disorder at the time of the accident recovery must not embrace damages to compensate for the disorder existing at the time but must be limited to those chargeable in reason to the defendant. The following facts of the Jones case distinguish it from the case at bar:

> "Dr. Stewart testified that the plaintiff might have been suffering from a *latent* infection, which, however, would be likely *never to break into activity or cause any discomfort or illness or pain* except for a violent fall or similar accident. If that be true, in this case the proximate cause of the pain, discomfort, and suffering from such latent disease would be the fall, and not the latent condition." (page 113)

Under the issue of the case in the Jones suit there is no conflict between the rules of law announced by this court in the Union Oil case and that cited by the appellees.

> "Where medical witnesses in an action for personal injuries disagree in opinion and theory, the undisputed history of the case is often the most satisfactory and controlling fact."
>
> Sorenson vs. Northern Pac. Ry. Co., 36 Fed. 166.
>
> See also: United States vs. Lumbra, 63 Fed. (2d) 796, 797-798.

Evidence that is consistent with an hypothesis that one contracted tuberculosis as a result of the accident

and also with an hypothesis that he did not tends to establish neither.

Eggen vs. U. S. 58 Fed. (2d) 616, *620;*

Gunning vs. Cooley, 281 U. S. 90, 74 L. Ed. 720.

The hospital record, a pertinent portion of which we have quoted at page 43 of our original brief, is not and cannot be disputed. It is eloquent not only for what it states but for what it does not state. What it does state and what was found by the pathologist and physicians after the operation are wholly irreconcilable with the appellees theory based upon the testimony of Mrs. Stanger. Again we remark that the pertinent thing that this hospital chart does not show is any record in the history of the case (and that appearing at page 43 of our brief is "case history") of her having been in any train derailment or railroad accident. We have no other conecrn on this point than that the court shall carefully read and verify by reference to the record those portions of the testimony cited at pages 41 to 43 and 47 to 51, inclusive, of our original brief. If this shall be done, which we are certain will be the case, we are confident that this court will without hesitation set aside the judgment rendered herein.

VI.

The authorities cited by the appellees under this point deal with assigned error in asserting excessive damages for ascertained injuries. The authorities so cited are not very helpful because in the present case damages have been awarded for

a condition ascertained to have been chronic and active except for temporary palliation and temporary relief.

VII.

Under this heading counsel cite authorities to the effect that the court will not reverse the trial court for refusal to grant a new trial and that a motion for new trial is not subject to review. It is unnecessary for us to debate this proposition because the appeal and the points urged herein are based upon the matters preceding the motion for new trial and, of course, the fact that the motion for new trial was denied does not in any way prevent or militate against the consideration of these questions.

That the judgment should be reversed is,

Respectfully submitted,

GEORGE H. SMITH
H. B. THOMPSON
L. H. ANDERSON

Attorneys for Appellant